No. 83-595

In the Supreme Court of the United States

OCTOBER TERM, 1983

KENNETH R. SNOW, ET AL., PETITIONERS

v.

QUINAULT INDIAN NATION, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a non-Indian engaged in business on fee land on the Quinault Indian Reservation is absolutely immune from paying a reasonable business tax adopted by the Quinault Indian Nation and made applicable to persons engaged in business within the Reservation.

2. Whether petitioners have an implied right of action under the Indian Civil Rights Act, 25 U.S.C. 1302(8), against the Quinault Nation and its officers to challenge the application of the tax to their businesses even though they did not exhaust the remedies afforded by the Quinault Nation to challenge the application of the tax.

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This brief is filed in response to the Court's invitation.

STATEMENT

1. In the Treaty of Olympia (12 Stat. 971 *et seq.*), the Quinault and Quileute Tribes ceded to the United States a vast tract of land on the Olympic Peninsula in the State of Washington. In return, the United States agreed to set aside a reservation for "exclusive use" of the Indians and stipulated that "no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent." Art. II, 12 Stat. 971. On November 4, 1873, President Grant issued an Executive Order designating approximately 200,000 acres along the Washington coast as the Reservation promised under the Treaty. Most of the land was heavily forested. Beginning in 1905, the federal government began to grant allotments of land on the Quinault Reservation in trust to individual Indians pursuant to the General Allotment Act of 1887, ch. 119, 24 Stat.

388, 25 U.S.C. 311 *et seq.* By 1935, the entire Reservation had been divided into 2,340 trust allotments. Approximately one-third of the Reservation land has since gone out of trust; the remaining two-thirds have remained in trust status. See generally *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983), slip op. 1-3. Most of the non-trust lands are owned by timber companies (Pet. App. A17). More than 95% of the jobs and dollar volume of economic activity on the Reservation is generated by wood harvesting and processing (*ibid.*). According to the Tribe (Br. in Opp. 8), at the present time, Indians comprise approximately two-thirds of the population of the Reservation.

The forest resources on allotted lands long have been managed by the Department of the Interior (*United States* v. *Mitchell*, slip op. 3), and the Tribe and its members maintain approximately 800 miles of forest roads to provide access to much of the Reservation's forested interior (Affidavit of Warren Shale 2; Br. in Opp. 13). In addition, the Quinault Department of Natural Resources and Economic Development provides a fire watch and equipment and personnel to fight forest fires on both fee and trust lands and exercises regulatory control over forest practices that can damage timber and fish resources. The tribal police department also protects against theft of timber on fee and trust lands. Pet. App. A17-A18.

The unincorporated Village of Amanda Park, where the petitioners in this case are engaged in business, is a tourist community adjacent to Lake Quinault. Both the village and the Lake are situated entirely within the Quinault Reservation, and the bed and banks of the Lake have been held to belong to the Tribe. *United States* v. *Washington*, 694 F.2d 188 (9th Cir. 1982), cert. denied, No. 82-1507 (June 27, 1983). The Tribe manages the Lake to preserve its natural beauty and serenity and to provide recreational opportunities for Indians and non-Indians. Consistent with these objectives, the Tribe reg-

ulates fishing and boating on the Lake by both Indians and non-Indians. Pet. App. A18-A19. The district court's opinion indicates that the Tribe also furnishes other services on the Reservation, including police and fire protection and ambulance, television relay, building inspection, and social services. With the exception of certain social programs, these services apparently are available without regard to whether the recipient is an Indian or a non-Indian and without regard to whether the land on which the services are rendered is in trust or fee status. Pet. App. A18.

For some years, the Quinault Tribe has had a Business License Ordinance (Quinault Tribal Code Tit. 40 (1961); Pet. App. A112-A121) that requires the annual payment of a $5.00 license fee by persons engaged in business within the Reservation (Quinault Tribal Code § 40.05; Pet. App. A116). In 1977, the Quinault Business Committee passed a resolution adopting rules under the Business License Ordinance that also impose a tax on persons engaged in business on the Reservation (Pet. App. A122-A142). The tax is imposed at a fixed rate (generally $25, $50 or $100, depending upon the type of business), multiplied by the number of employees in the business. Thus, for example, a person engaged in the business of harvesting green timber (for which the applicable tax rate is $50 per employee (*id.* at A127)) who employed two employees in his operation would pay an annual tax of $100. In order to encourage the employment of Indians, however, the tax rate is reduced by one-half as applied to any employee who is an enrolled tribal member (*id.* at A136).

2. a. This action was filed on July 26, 1977, in the United States District Court for the Western District of Washington by petitioners and others to challenge the application to their businesses of the Tribe's business tax. The three petitioners are non-Indians who own and operate businesses on fee land in Amanda Park, adjacent to Lake Quinault. Petitioner Snow operates a general store; petitioner Hull operates a cafe and tavern; and petitioner

Sansom operates a service station. Pet. 6.[1] Snow sells tribal fishing permits at his general store (Pet. App. A19), and Sansom sells outboard motors and fishing tackle at his service station (Affidavit of Guy Sansom 2).

Because the suit was filed before the August 1, 1977 effective date of the business tax (Pet. App. A122), petitioners had not then paid any tax, and we have been informed by counsel for the Tribe that petitioners still have not done so. We have been further informed that, although the tax provisions adopted in 1977 authorize the Quinault Department of Revenue to determine and assess the amount of the tax due if the taxpayer does not file a return and pay the tax as required by tribal law (Rule 3.40(6) and (7); Pet. App. A139-A141), the Department of Revenue did not pursue these steps for any tax from 1977 to the present because of the pendency of this suit.

In addition, in 1979, the Tribe adopted a procedure by which a taxpayer may challenge the tax. See Quinault Tax Refund Act, codified at Tit. 40A of the Quinault Tribal Code (1961). Under the Quinault Tax Refund Act, a taxpayer who has paid the tax may, within 90 days, bring an action for refund in Tribal Court against the Quinault Department of Revenue. The Tribal Court may determine "any factual or legal issue affecting the payment of such tax," and "[p]ayment of the challenged tax is a condition precedent to the right of review of any issue of fact or law affecting taxes imposed by the Quinault Indian Nation." Quinault Tribal Code §§ 40 A.01.030, 40 A.01.060 (1961). There is no indication that petitioners have availed themselves of this procedure to challenge the validity of the business tax as applied to them, and indeed that remedy is unavailable if, as appears, they have not first paid the tax and then requested a refund.

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[1] A number of other individuals joined the three petitioners as plaintiffs in district court and as appellants in the court of appeals (Pet. App. A1; Br. in Opp. 5 n.), but they have not sought review in this Court.

Because petitioners have never paid a tax to the Tribe and the Tribe has never assessed a tax against them, the record does not definitively establish the amount of tax petitioners would owe under the Tribal Code. However, an affidavit dated August 17, 1978 filed by petitioner Snow in district court stated that his general store employed five individuals, all of who are non-Indians. Based on this information, Snow would be liable for a tax of $250, computed by using the base rate of $50 per employee for the business of the retail sale of tangible personal property (see Rule 2.40(5)(a); Pet. App. A129-A130). In addition, Snow's affidavit stated that he would owe a tax of $100 for engaging in the business of rental or lease of real property (see Rule 2.40(6)(*ll*); Pet. App. A136). By way of comparison, Snow stated in his affidavit that he paid to the State or County all sales taxes payable on items sold in his retail store, as well as approximately $1,760 in real and personal property taxes on his store and rental houses, a business and occupation tax of $630, and a master license tax of $96.

Petitioner Sansom filed an affidavit dated August 18, 1978 stating that he employed two individuals, including himself, at his service station in Amanda Park. The base tax rate for a service station is $25 per employee (Rule 2.40(5)(m); Pet. App. A131), which would indicate that Sansom would owe the Tribe a total amount of $50, although there is some dispute regarding the amount of tax he would actually owe.[2] By way of comparison, Sansom

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[2] Sansom speculated in his affidavit that he would be separately liable for a tax on each of certain ancillary features of his service station business—such as a storage garage business, automotive towing, operation of vending machines, auto and truck repair, and making sales at retail—which could increase his total tax liability to $500. However, an affidavit filed by Leda Williams, the Acting Revenue Clerk of the Tribe, stated that Sansom appeared to have overstated his tax liability and that he was entitled to consult with her office to determine his tax liability. There is no indication that he did so. Similarly, the Tribe states in its Brief in Opposition (at 21 n.) that Sansom may owe an annual tax of only $50 or $100.

stated in his affidavit that he paid an unspecified amount of sales taxes to the State of Washington and $740 in county property taxes. The record does not disclose petitioner Hull's tax liability under tribal or state law.

b. On September 29, 1980, the district court granted summary judgment for respondents (Pet. App. A13-A24). The court first noted that the Tribe had raised the defense of sovereign immunity, but it declined to reach that question because plaintiffs also had joined the Tribe's Revenue Clerk, over whom it found jurisdiction (Pet. App. A15).

On the merits, the district court sustained the validity of the tax. It observed that the Tribe had recognized "the need to establish a reliable revenue base for the delivery of government services and to reduce dependence on unreliable federal funding" and that "[s]uch efforts must focus on commerce generated by the Reservation's resources." Pet. App. A20. The court also stressed that the question was not whether the plaintiffs paid taxes to and received services from the State and County, as petitioner Snow claimed, but instead whether the Tribe also could impose a tax on the plaintiffs. In holding that the Tribe could do so, the court explained that "[t]he record establishes that the Plaintiffs do business within the Quinault Reservation and that the tribal government provides services which are available and of benefit to Plaintiffs and others doing business within the Reservation's boundaries." *Id.* at A21 (citing *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444-446 (1940)).

The district court found its holding reinforced by the then-recent decision in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 147 (1980) (Pet. App. A22). The court rejected the contention that *Colville* should be read to recognize tribal taxing authority only with respect to transactions on trust land, observing that "the authorities relied upon by the Court in *Colville* themselves dealt with tribal civil jurisdiction, in some cases taxing jurisdiction, on both fee and trust land" (Pet. App. A22-A23).

Finally, the district court held that it did not have jurisdiction over the plaintiffs' contention that the tribal tax is discriminatory in violation of the Indian Civil Rights Act (25 U.S.C. 1302(8)) because of the lower rate as applied to employees who are tribal members. The court held that "[t]he tribal forum for the adjudication of such claims is exclusive both for Indians and non-Indians." Pet. App. A23 (citing *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978)).

c. The court of appeals affirmed the district court's award of summary judgment in favor of the respondents (Pet. App. A1-A12). It held that under this Court's decision in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 58, the Tribe itself is immune from suit (Pet. App. A5). The court further held that the instant action was barred as against the Tribe's Revenue Clerk unless her actions in administering the Ordinance were outside the scope of the Tribe's sovereign powers (*ibid.*). The court concluded that they were not. In the court of appeals' view, the case was governed by this Court's decision in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which sustained a tribal severance tax as applied to non-Indians. Especially significant, the court below believed, was this Court's approval in *Merrion* of *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906), which upheld such a tax even as applied to businesses on sites in an incorporated town that had been patented to non-Indians. The court concluded that application of the Quinault Tribe's tax to non-Indians engaged in business within the Reservation is a valid exercise of the Tribe's inherent sovereign power to raise revenue to support tribal governmental services. Pet. App. A6-A7.

The court of appeals also held that under this Court's decision in *Santa Clara Pueblo* v. *Martinez*, *supra*, petitioners do not have a cause of action in federal court against the Tribe or its officers under the Indian Civil Rights Act (ICRA) for an alleged denial of equal protection because a lower tax rate is applicable in the case

of employees who are tribal members (Pet. App. A10-A11). The court explained that Snow "has not submitted his ICRA denial of equal protection claim to the Quinault tribal court" and that "[h]e cannot now avoid the tribal court by claiming that the district court properly has jurisdiction over this ICRA claim" (Pet. App. A11).

DISCUSSION

The decision of the court of appeals sustaining the authority of the Quinault Tribe to apply its modest business tax to non-Indians and holding that no cause of action lies against the Tribe or its officers under the Indian Civil Rights Act in the circumstances of this case is correct and does not conflict with any decision of this Court or any court of appeals. Review by this Court therefore is not warranted.

1. a. The court of appeals was plainly correct in concluding that an Indian Tribe is not wholly barred from applying a reasonable tax to the commercial activities of a non-Indian engaged in business on the Reservation simply because the non-Indian's business happens to be conducted on fee land. To be sure, some activities of non-Indians on fee land within a reservation are not subject to tribal jurisdiction. This is true, for example, with regard to largely private conduct by a non-Indian that can be viewed as a normal incident of his ownership of the fee to the land, such as the hunting and fishing at issue in *Montana* v. *United States*, 450 U.S. 544 (1981)—at least where the non-Indian's conduct has no impact on the legal rights, political integrity, economic security, or health or welfare of the Tribe or its members and is unrelated to any dealings between the non-Indian and the Tribe or its members. See *id.* at 558 n.6, 565-566. In such a case, the allotment of land within a Reservation pursuant to the General Allotment Act of 1887 and the eventual passage of fee title to a non-Indian can be thought to confer a right on the non-Indian to conduct his own private affairs on the tract he has acquired. Cf. 450 U.S. at 559-560 n.9. But the alienation of Reservation land does not

wholly exempt the new owner from otherwise governing Reservation law.

As the Court recognized in *Montana* itself (450 U.S. at 565-566), the passage of title to a non-Indian does not render an allotted parcel an enclave that is insulated for *all* purposes from the broader Reservation community of which the parcel remains a part. See also *New Mexico* v. *Mescalero Apache Tribe*, No. 82-331 (June 13, 1983), slip op. 7 n.12; *Solem* v. *Bartlett*, No. 82-1253 (Feb. 22, 1984), slip op. 4 ("Federal, State, and Tribal authorities share jurisdiction over [opened] lands if the relevant surplus land act did not diminish the existing Indian reservation."). Indeed, as the Court stressed in *Solem* v. *Bartlett*, slip op. 4, Congress itself has explicitly declared *all* lands within a reservation, including land owned in fee by non-Indians, to be "Indian country" (18 U.S.C. 1151(a)), thereby confirming by legislation that land owned in fee by non-Indians does not for that reason lose its relationship to the reservation community or to the tribal government responsible for maintaining the welfare of that community.[3] This is especially so where, as here, the non-Indian is not devot-

[3] In *Solem* v. *Bartlett*, *supra*, the Court unanimously held that a surplus land act opening a portion of a reservation for immediate disposition directly to non-Indians will not be construed to have terminated the reservation status of the opened portion in the absence of "substantial and compelling evidence" of congressional intent to that effect (slip op. 9). It follows from the decision in *Solem* v. *Bartlett* that the Tribe likewise retains an interest in conduct on non-Indian land within the reservation where, as here, the passage of land into non-Indian hands was not the result of the implementation of a congressional policy embodied in a surplus land act that contemplated a rather abrupt and broad disposition of land to non-Indians, but rather was the incidental, gradual, and random consequence of a general allotment policy that since has been formally abandoned by Congress itself in the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. 461 *et seq.* That is particularly true here, given the subsequent history of the Quinault Reservation, on which two-thirds of the acreage remains in trust status and Indians comprise two-thirds of the population. Compare *Solem* v. *Bartlett*, slip op. 8, 16-17.

ing his land to an essentially private use, but instead is engaging in a public commercial enterprise that entails the opening of his premises to the public generally. The General Allotment Act cannot be thought to confer on the non-Indian, as an incident to his mere ownership of the land, an implied (yet absolute) immunity from complying with reasonable measures adopted by Tribe in such circumstances.

Of course, the State also may have a legitimate interest in the on-reservation conduct of the non-Indian and matters affecting his land. But this does not cancel the Tribe's interest. To the contrary, in some instances (such as land use by a non-Indian that may have a substantial impact on adjacent Indian land and resources), the Tribe's interest may far exceed that of the State. The task, then, is to accommodate the legitimate interests of the Tribe and the State. This Court has specifically recognized these principles in the area of taxation of a non-Indian's activities on an Indian reservation, stressing that "different sovereigns can enjoy powers to tax the same transactions" and that "the mere existence of state authority to tax does not deprive the Indian tribe of its power to tax." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 151 (1982). See also *Colville*, *supra*, 447 U.S. at 156-158. The Ninth Circuit's decision in this case accomplishes such an accommodation of state and tribal interests. It does not affect the power of the State or County to levy taxes on petitioners' businesses to support the governmental services that they assertedly furnish to petitioners and others. The decision below simply recognizes that the Tribe has a parallel interest in levying taxes to support the governmental services *it* furnishes and sustains a tribal tax that is far more limited in amount than the applicable county and state taxes.

b. This Court's precedents firmly support the authority of the Tribe to impose a tax on the conduct of non-Indians on fee land. In *Morris* v. *Hitchcock*, 194 U.S. 384 (1904), the Court sustained the application of a tax by the Chickasaw Nation on non-Indians who were graz-

ing their cattle on Indian land. In so holding, however, the Court cited with approval two opinions of the Attorney General that explicitly recognized the authority of the Tribe to impose a tax on non-Indians' activities on land owned by non-Indians. 194 U.S. at 391-392. In the first opinion, the Attorney General explained that "even if the Indian title to the particular lots sold had been extinguished, * * * the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation * * * . The United States might sell lands which it holds in a State, but it would be a strange contention that this gave the purchaser any immunity from local laws or local taxation." 23 Op. Att'y Gen. 214, 217 (1900). The Attorney General reiterated this position in the second opinion cited in *Morris* v. *Hitchcock*, *supra* (23 Op. Att'y Gen. 528, 530 (1901)), and indeed this Court noted, with apparent approval, the Attorney General's conclusion that the tax on the exportation of hay by non-Indians would be valid "even if the shipper was the absolute owner of the land on which the hay was raised." 194 U.S. at 392.

More recently, the Court repeatedly has confirmed that a Tribe's sovereign power—and particularly its power to tax—extends in some measure to the activities of non-Indians even on fee land. This view is reflected generally, of course, in the Court's oft-quoted observation that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory" (*United States* v. *Mazurie*, 419 U.S. 544, 557 (1975), quoted in *New Mexico* v. *Mescalero Apache Tribe*, slip op. 8; *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. at 140; and *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980)). The reference in *Mazurie* (and thus in the latter cases as well) to the Tribe's "territory" was not limited to only those parcels of land on a reservation that are owned by or held in trust for the Tribe or individual members, since *Mazurie* itself involved the conduct of non-Indians on land owned in fee by a non-Indian.

Moreover, in *Colville*, the Court specifically sustained the Tribes' power to impose a tax on the on-reservation sale of cigarettes to non-Indians, even though the State also imposed a tax on the transactions. As the district court recognized in the instant case (Pet. App. A22-A23), although the particular transactions in *Colville* took place on trust lands, the authorities relied upon by the Court in sustaining the tax were not so limited. The Court cited (447 U.S. at 153) the 1900 Opinion of the Attorney General discussed above (23 Op. Att'y Gen. 214), as well as the comprehensive 1934 opinion of the Solicitor of the Interior concerning the power of Indian Tribes that stated that "[c]hief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation"—a power which was viewed as extending, without regard to ownership of the land, to "nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions" (55 Interior Dec. 14, 46 (1934)). In addition, in observing that "[f]ederal courts also have acknowledged tribal power to tax non-Indians entering the reservation to engage in economic activity" (447 U.S. at 153), the Court in *Colville* relied upon *Morris* v. *Hitchcock*, *supra*, which (as we have said) expressed approval of Attorney General opinions that the application of such taxes even to activities on non-Indian land, as well as *Buster* v. *Wright*, 135 F. 947, 950 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906), which explicitly sustained such a tax. ENCLOSED

Similarly, in *Montana* v. *United States*, *supra*, upon which petitioners principally rely, the Court—even as it struck down a tribal prohibition against hunting and fishing by non-Indians on land owned in fee by non-Indians—stressed that Indian Tribes do "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," and that a Tribe therefore may regulate through taxation and other means the activities of nonmembers

who enter consensual relationships with the Tribe or its members, through commercial dealings or otherwise. 450 U.S. at 565.[4] Since petitioners are engaged in commercial dealings with the public at large on the Reservation and thus have opened their premises to Indians and non-Indians alike, they, like the non-Indians engaged in business in *Buster* v. *Wright, supra*, are subject to taxation by the Tribe under the principles reaffirmed in *Montana*. Moreover, petitioner Snow sells tribal fishing licenses and apparently maintains an account for the Tribe at his store, and thus has entered into a specific relationship with the Tribe beyond the course of his general commercial dealings. The Court in *Montana* also stated that a Tribe retains inherent civil authority over other conduct of non-Indians on fee lands within the Reservation that threatens or has a direct effect on the political integrity, economic security, or health or welfare of the Tribe. 450 U.S. at 566. The commercial dealings of the non-Indian businessmen in this case—in a tourist community adjacent to a Lake owned and maintained by the Tribe—establishes a sufficient nexus to tribal interests to sustain the exercise of civil authority by the Tribe under this aspect of the *Montana* rationale as well.[5]

Finally, this Court's decision in *Merrion* v. *Jicarilla Apache Tribe, supra*, also firmly supports application of the Quinault Nation's tax ordinance to activities of non-Indians on fee lands. Although the specific tax in *Merrion* pertained to extraction of minerals on land held for the

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[4] Once again, the Court cited *Morris* v. *Hitchcock, supra*, and *Buster* v. *Wright, supra*, for this proposition, thereby making clear that the result in *Montana* itself with respect to hunting and fishing by non-Indians that did not affect Indian interests did not disturb the long-recognized principle of Indian law that Indian Tribes have inherent authority to impose taxes on non-Indians.

[5] Petitioner Sansom, for example, sells fishing tackle and outboard motors that presumably would be useful on Lake Quinault or other waters of the Reservation that were reserved to the Tribe for fishery purposes. See *Montana* v. *United States*, 450 U.S. at 566 n.15.

Tribe's benefit, the Court's rationale was not so limited, just as it was not in *Colville*. The Court stressed in *Merrion* that the power of a Tribe to tax non-Indians does not derive from its power to exclude non-Indians from the reservation. "Instead," the Court held, "it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the costs of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." 455 U.S. at 137. And with particular relevance to petitioners' claim of exemption in this case, the Court stressed that " '[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, *nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens of foreigners.*' " 455 U.S. at 143 (emphasis added by this Court) (quoting *Buster* v. *Wright*, 135 F. at 952). Thus, the mere fact that the petitioners in this case are engaged in business on land owned by non-Indians, and thus presumably could not be excluded from the Reservation, does not support the recognition of an implied immunity from tribal taxation of their commercial activities.

c. Strong policies recognized by the Court in *Merrion* support this result as well. Petitioners, like the petitioners in *Merrion*, "avail themselves of the 'substantial privilege of carrying on business' on the reservation," and "[t]hey benefit from the provision of police protection and other governmental services, as well as from ' "the advantages of a civilized society" ' that are assured by the existence of tribal government." 450 U.S. at 137-138 (quoting *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 437 (1980), and *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, 447 U.S. 207, 228 (1980)). The Tribe's law enforcement activities maintain law and order in the reservation community generally, and indeed *only* the Tribe would have jurisdiction to prosecute Indians who

commit non-major crimes even on petitioners' premises. The Tribe no doubt affords the "advantages of a civilized society" through its tribal government in other ways as well, such as in the administration of its Tribal Court, which presumably is open to suits by non-Indians. It may be that the tribal police have not actually had occasion to respond to a call at petitioners' premises and that petitioners have not had a need to sue in Tribal Court, but petitioners did not dispute the Tribe's submission that these and other services at least are available to them. Under established principles of taxation, the fact that an individual has not actually availed himself of a particular governmental service or program that his tax payments support does not ordinarily excuse him from his obligation to defray the expenses of the government generally (*Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981)), and there is no reason for a different result with respect to a tax imposed by an Indian Tribe.

Other activities of the Tribe also presumably benefit petitioners. The maintenance of roads and fire protection for the forested expanses of the Reservation serve to protect the Reservation's dominant resource and economic activity, which in turn benefit to some degree everyone who resides or does business on the Reservation. If timber activities and resulting employment ceased, for example, petitioners' businesses almost surely would be adversely affected. And more directly, the Tribe maintains Lake Quinault and regulates fishing and boating activities on it, thereby benefiting the tourist trade in the Lake Quinault area, to which petitioners assertedly cater.

Thus, the Tribe's tax in this case would appear to be fully consistent with the Court's holding in *Merrion* that "Indian tribes enjoy authority to finance their governmental services through taxation of non-Indians who benefit from those services." 455 U.S. at 140. There is no occasion in this case to consider what the outer limits of a Tribe's authority to impose a tax might be, because petitioners have not challenged the *amount* of the tax they owe if, as we have shown, they are not absolutely immune

from imposition of any tax. Moreover, the record in this case does not firmly establish the amount of tax petitioners would owe—although whatever its precise amount, the tax seems quite modest in amount and therefore well within the Tribe's power.

d. As the foregoing discussion establishes, petitioners' contention that they are wholly immune from the Tribe's tax solely by virtue of the fact that their businesses are conducted on fee lands is inconsistent with the fabric of Indian law recognized in this Court's decisions. Petitioners also point to no decisions of other courts of appeals that conflict with the decision below. There accordingly is no reason for the Court to grant review.

We note as well that petitioners have never paid a tax to the Tribe or sought to establish before the Tribe's Department of Revenue or in Tribal Court the amount of their liability or their entitlement to an exemption from taxation based on an assertedly insufficient nexus with tribal affairs. In our view, where, as here, a Tribe has established an adequate mechanism for review of such questions, in a suit for a refund or otherwise, the non-Indian taxpayer should be required to utilize that mechanism before bringing an action in federal court to enjoin administration of the tribal tax. Cf. *South Carolina* v. *Regan*, No. 94, Orig. (Feb. 22, 1984), slip op. 4-13. Such a result would respect the principles of *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), and *Williams* v. *Lee*, 358 U.S. 217 (1959), which recognize the administration of tribal courts as an important feature of tribal sovereignty and self-government and as a suitable means for resolution of disputes involving non-Indians. Exhaustion of tribal remedies also would afford the Tribal Court an opportunity to apply its own law, determine the amount of tax actually owed, and perhaps give the tax provision a narrow construction in order to avoid any difficulties that might be raised by its application to a particular non-Indian who claims to have an insufficient nexus to the Tribe to support imposition of the tax, in whole or in part.

The limited and somewhat opaque nature of the record in federal district court in this case may be partially attributable to petitioners' failure to sharpen the issues through resort to tribal processes. We note, for example, that the Tribe and petitioners disagree regarding the amount of the tax petitioner Sansom actually would owe and that the record does not contain any evidence on the activities or potential liability of petitioner Hull. And even with respect to petitioner Snow, there has been no formal finding by the Tribe's Department of Revenue or the Tribal Court of the amount of the tax he would owe or the justifications for the assessment. Accordingly, even if the Court were otherwise disposed to grant review in a case raising the question of a Tribe's authority to tax non-Indians, this would not be an especially suitable vehicle for that undertaking.

2. Petitioners contend (Pet. 26-36) that the court of appeals erred in holding that the district court did not have jurisdiction over their claim arising under the Indian Civil Rights Act, 25 U.S.C. 1302(8). See Pet. App. A9-A11. Their substantive claim is that the Tribal tax deprives them of their right to equal protection of the laws under the ICRA because the rate applicable to employees who are tribal members is lower than it is for other employees. See Pet. 31. The court of appeals correctly concluded, however, that under this Court's decision in *Santa Clara Pueblo* v. *Martinez*, *supra*, petitioners have no cause of action under the ICRA against the Tribe or its Revenue Clerk in the circumstances of this case, especially since they have not pursued available remedies in Tribal Court.

In *Martinez*, the Court held that the Tribe itself was immune from suit for an alleged denial of equal protection in violation of the ICRA (436 U.S. at 58-59). That holding plainly bars petitioners' suit against the Quinault Nation here. The Court in *Martinez* concluded that the Tribe's immunity did not extend to the tribal official who also was sued in that case (436 U.S. at 59), but it held that the suit against the tribal official nevertheless had to

be dismissed because there is no implied cause of action in federal court under the ICRA against the Tribe or its officers. 436 U.S. at 59-72. As the court of appeals recognized (Pet. App. A10-A11), this explicit holding in *Martinez* clearly bars the instant suit against the Tribe and its Revenue Clerk for an alleged violation of the ICRA.

Petitioners contend (Pet. 28-29) that the decision below on this point conflicts with the Tenth Circuit's decision in *Dry Creek Lodge, Inc.* v. *Arapaho & Shoshone Tribes*, 623 F.2d 682 (1980), cert. denied, 449 U.S. 1118 (1981), in which the court of appeals permitted a non-Indian to bring a damage action against a Tribe under the ICRA, and that the Court should grant certiorari here to resolve that conflict. We disagree. As an initial matter, the Tenth Circuit's decision in *Dry Creek Lodge* was so flatly inconsistent with this Court's clear holding in *Martinez* that it is not likely to be of significant precedential value, and indeed it has proven to be something of an aberration even in the Tenth Circuit. See *Ramey Construction Co.* v. *Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319 n.4 (10th Cir. 1982) (distinguishing *Dry Creek Lodge* as a case involving "particularly egregious allegations of personal restraint and deprivation of personal rights"); *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1346 (10th Cir. 1982) (same; stressing that a court should be cautious in stripping a Tribe of its traditional immunity). Moreover, it was critical to the Tenth Circuit's holdng in *Dry Creek Lodge* that the plaintiff had been denied all access to the tribal court (623 F.2d at 685). Accord *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d at 1346. Here, by contrast, as the court of appeals stressed (Pet. App. A11), petitioners did *not* seek to present their ICRA claim to the Tribal Court. See page 8, *supra*. There thus is no conflict between the holding below and that in *Dry Creek Lodge* with respect to the existence of an implied right of action under the ICRA where the plaintiff has not exhausted his tribal remedies.

An exhaustion requirement would be appropriate even if a right of action can be implied under the ICRA in cer-

tain circumstances, notwithstanding the Court's clear holding to the contrary in *Martinez*. Initial resort to tribal processes as a precondition to filing suit in federal court would respect at least in some measure the principles of tribal self-government stressed in *Martinez*, in which the Court made clear that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." 436 U.S. at 65 (footnote omitted). The area of taxation is one in which this Court has recognized the strong congressional policy against interference by federal courts with administration of tax laws where, as here, there is another available remedy afforded by the taxing entity, such as a suit for a refund. See, *e.g.*, *California* v. *Grace Brethren Church*, 457 U.S. 393, 407-419 (1982). Moreover, even if the differing tax rates adopted by the Quinault Nation to encourage the hiring of tribal members were held to violate the equal protection guarantee of the ICRA (but see *Morton* v. *Mancari*, 417 U.S. 535 (1974)),[6] it would not follow that the entire tax ordinance would fall and that petitioners would be excused from paying any tax. The equal protection violation could be just as readily remedied by a holding that the special tax credit for an employer who hires tribal members is severable from the remainder of the tax provisions, with the result that the higher tax rate would be applied to Indian employees as well as non-Indian employees. See *Heckler* v. *Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 10-11. The Tribal Court therefore should be given an opportunity to pass on petitioners' contention in the first instance because of the possibility that the tax

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[6] Congress itself has provided an exemption from Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.*, for an employer who grants a preference to Indians in hiring on or near a reservation. 42 U.S.C. 2000e-2(i). There accordingly is no reason to believe that the Quinault Nation's limited tax incentive to hire Indians is inconsistent with congressional policy.

credit for employees who are tribal members could be severed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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